Khaw Tiew Chai v Lee Chai Seng & Ors and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS P-02-(IM)-209–01 OF 2018 AND P-02(W)-211–01 OF 2018
TENGKU MAIMUN, MARY LIM AND HASNAH HASHIM JJCA
16 OCTOBER 2018

Bankruptcy — Capacity of bankrupt — Competency to maintain action — Learned judge struck out appellant's action on ground that appellant was a bankrupt, hence, incompetent to maintain civil suit — Whether appellant obtained Director General of Insolvency's sanction to institute civil suit — Whether appellant still a bankrupt — Whether appellant competent — Bankruptcy Act 1967 s 38(1)

Civil Procedure — Res judicata — Similar issues — Appellant filed originating summons ('OS') against first to fourth respondents to cancel share certificates of fifth respondents which were issued to first to fourth respondents — Action dismissed — Appellant filed fresh action on basis that respondents had misled High Court which resulted in dismissal of the OS — Whether appellant's action caught by doctrine of res judicata

Companies and Corporations — Shares — Purchase of shares — First to fourth respondents purchased shares from appellant — Whether first to fourth respondents had paid purchase price — Issue of shares — Whether issuance of new shares by fifth respondent to first to fourth respondents valid — Whether learned judge correct in exercising power under s 355(2) of the Companies Act 1965 — Companies Act 1965 ss 132D & 355

The appellant was the shareholders of the fifth respondent whereas the first to fourth respondents were the directors of the fifth respondents. The appellant and another shareholder named Chen had invited the first, second, third and fourth respondents to be the shareholders of the fifth respondent. The appellant and Chen agreed to sell 80,000 units of shares, with the value of RM1 for each unit of share, to the first to fifth respondents. The shares were subsequently transferred and registered in the names of the first to fourth respondents. On 3 May 2005, the fifth respondent caused to be issued 2,946,283 new shares. The appellant contended that the first to fourth respondents failed to pay the purchase price of the shares. Consequently, the appellant had filed an originating summons ('the OS') seeking an order, inter alia, to cancel the share certificates of the fifth respondent that were issued by the company secretary, Ong Ghin Leong ('Ong') to the first to fourth

respondents. The first to fourth respondents relied on the statutory declaration affirmed by Ong which stated that the purchase price of RM80,000 for the 80,000 shares had been settled by the first to fourth respondents with the appellant and Chen. It ought to be noted that Ong had filed a police report stating that the contents of the said statutory declaration were incorrect. But subsequently, Ong filed another report where he stated that the earlier report was made under threats and harassment of the appellant. The OS was dismissed by the learned High Court judge on 27 January 2006. The appellant's appeal to the Court of Appeal was dismissed and the appellant's application for leave to appeal to the Federal Court was also dismissed. Consequently, the appellant filed an action at the High Court on the basis that the respondents had misled the High Court which resulted in the dismissal of the OS on 27 January 2006. On the other hand, the first respondent applied to strike out the appellant's claim under O 18 r 19(1)(b), (c) or (d) of the Rules of Court 2012. The learned judge had allowed the first respondent's application and dismissed the appellant's claim, hence, the present appeals. Appeal No IM 209 was in relation to the High Court's decision in allowing the striking out application whereas Appeal No 211 was in respect of the dismissal of the appellant's claim after a full trial. The appellant submitted that: (a) the learned judge erred in concluding that the doctrine of res judicata was applicable to the present suit; and (b) there was no payment of RM80,000 and that the issuance of the 2 million over new shares contravened s 132D of the Companies Act 1965 ('the CA').

Held, allowing Appeal No IM209 and dismissing Appeal No 211 with no order as to costs:

(1) The learned judge was plainly wrong in allowing the first respondent's application to strike out the appellant's claim on the ground that the appellant was incompetent to maintain the civil suit. It did not stand to reason that the learned judge accepted that the appellant was not competent to maintain the action and therefore allowed the striking out, yet at the same time His Lordship proceeded to determine the appellant's claim on its merits. In any event, s 38(1) of the Bankruptcy Act 1967 stated that where a bankrupt had not obtained his discharge, he shall be incompetent to maintain any action without the previous sanction of the Director General of Insolvency ('the DGI'). In the present case, the DGI had in fact granted sanction to the appellant to proceed with the civil suit. Further, by an order of the High Court dated 26 September 2017 which annulled the receiving and adjudication orders, the appellant was no longer a bankrupt. Therefore, the appellant was competent to maintain the civil suit (see paras 7–10).

(2) The court found nothing in the record of appeal to show that the issue of false statutory declaration by the company secretary was canvassed and adjudicated by the Court of Appeal in dismissing the appellant's appeal

and/or by the Federal Court in dismissing the leave application. As such, the court disagreed with the learned judge that the appellant's instant suit was caught by the doctrine of res judicata (see paras 38–39).

(3) Be that as it may, the court agreed with the learned judge that on the preponderance of the evidence, the first to the fourth respondents had paid the appellant in respect of the purchase of the shares in the fifth respondent. The learned judge found that there was a direct clash in the testimony of the appellant and the first to fourth respondents over the payment and receipt of the RM80,000 for the purchase of the shares. His Lordship accepted the evidence of the latter and he gave his reasons for doing so. The court found no basis to rule otherwise and to depart from the learned judge who had the audio-visual advantage of seeing and hearing the witnesses (see paras 41 & 46).

(4) Notwithstanding the non-compliance with s 132D of the CA, the learned judge declared the issuance of the new shares as valid. His Lordship opined that it was unnecessary for the issuance of the new shares to be approved by the general meeting because all the existing shareholders were also directors; they were all present at the board of directors' meeting on 3 May 2005 and that no existing shareholders were affected and prejudiced by the non-holding of the prior general meeting. In declaring that the issuance of the new shares was valid, His Lordship exercised the power available to him under s 355(2) of the CA. The court found that the learned judge was correct in his application of s 355 of the CA. The learned judge had arrived at his decision by assessing, weighing and for good reasons had accepted the evidence of the first to fourth respondents over the appellant. There was no reason for the court to disturb the findings of the learned judge (see paras 48–50).

[Bahasa Malaysia summary

Perayu adalah pemegang saham responden kelima sementara responden pertama hingga keempat adalah pengarah-pengarah responden kelima. Perayu dan pemegang saham satu lagi yang bernama Chen telah menjemput responden pertama, kedua, ketiga dan keempat untuk menjadi pemegang-pemegang saham responden kelima. Perayu dan Chen bersetuju untuk menjual 80,000 unit saham, dengan nilai sebanyak RM1 bagi setiap unit saham, kepada responden pertama hingga kelima. Saham-saham kemudiannya dipindahkan dan didaftarkan atas nama-nama responden pertama hingga keempat. Pada 3 Mei 2005, responden kelima mengeluarkan saham baru sebanyak 2,946,283 unit. Perayu berhujah bahawa responden pertama hingga keempat gagal untuk membayar harga belian saham-saham tersebut. Akibatnya, perayu telah memfailkan saman pemula ('SP') memohon perintah, antara lain, untuk membatalkan sijil-sijil saham responden kelima yang dikeluarkan oleh setiausaha syarikat, Ong Ghin Leong ('Ong') kepada responden pertama hingga keempat. Responden pertama hingga keempat

bergantung ke atas perisytiharan statutori yang disahkan oleh Ong yang menyatakan bahawa harga belian sebanyak RM80,000 bagi 80,000 saham telah diselesaikan oleh responden pertama hingga keempat dengan perayu dan Chen. Ia patut diambil perhatian bahawa Ong telah memfailkan laporan polis dengan menyatakan bahawa isi kandungan perisytiharan statutori tersebut adalah salah. Tetapi Ong kemudiannya memfailkan laporan satu lagi di mana dia menyatakan bahawa laporan yang dibuat sebelumnya adalah dibuat di bawah ancaman dan gangguan perayu. SP tersebut ditolak oleh hakim Mahkamah Tinggi yang bijaksana pada 27 Januari 2006. Rayuan perayu kepada Mahkamah Rayuan ditolak dan permohonan perayu untuk izin merayu kepada Mahkamah Persekutuan juga ditolak. Akibatnya, perayu memfailkan tindakan di Mahkamah Tinggi atas asas yang responden-responden telah menipu Mahkamah Tinggi yang menyebabkan penolakan SP pada 27 Januari 2006. Sebaliknya, responden pertama memohon untuk membatalkan tuntutan perayu di bawah A 18 k 19(1)(b), (c) atau (d) Kaedah-Kaedah Mahkamah 2012. Hakim yang bijaksana telah membenarkan permohonan responden pertama dan menolak tuntutan perayu, maka, rayuan ini. Rayuan No IM 209 adalah berkaitan kepada keputusan Mahkamah Tinggi dalam membenarkan permohonan pembatalan sementara Rayuan No 211 adalah berkaitan penolakan tuntutan perayu selepas perbicaraan penuh. Perayu berhujah bahawa: (a) hakim perbicaraan yang bijaksana tersilap dalam memutuskan bahawa doktrin res judicata boleh digunapakai kepada tindakan ini; dan (b) tidak terdapat bayaran sebanyak RM80,000 dan pengeluaran 2 juta saham baru bertentangan s 132D Akta Syarikat 1965 ('AS').

Diputuskan, membenarkan Rayuan No IM 209 dan menolak Rayuan No 211 tanpa perintah terhadap kos:

(1) Hakim yang bijaksana jelas salah dalam membenarkan permohonan responden pertama untuk membatalkan tuntutan perayu atas alasan bahawa perayu tidak kompeten untuk mengekalkan tindakan sivil. Ia tidak dapat dipertahankan untuk memberi alasan yang hakim yang bijaksana menerima bahawa perayu tidak kompeten untuk mengekalkan tindakan tersebut dan dengan itu membenarkan pembatalan tersebut, tetapi pada masa yang sama Yang Arif meneruskan untuk menentukan tuntutan perayu atas meritnya. Walau bagaimanapun, s 38(1) Akta Kebankrapan 1967 menyatakan bahawa di mana seorang bankrap tidak mendapatkan pelepasannya, dia akan menjadi tak kompeten untuk mengekalkan apa-apa tindakan tanpa sanksi terdahulu Ketua Pengarah Insolvensi ('KPI'). Dalam kes ini, KPI telah sebenarnya memberikan saksi kepada perayu untuk meneruskan dengan tindakan sivil. Selanjutnya, melalui perintah Mahkamah Tinggi bertarikh 26 September 2017 yang membatalkan perintah penerimaan dan penghakiman, perayu bukan lagi seorang bankrap. Oleh itu, perayu

A adalah kompeten untuk mengekalkan tindakan sivil tersebut (lihat perenggan 7–10).

(2) Mahkamah mendapati tiada apa-apa dalam rekod rayuan untuk menunjukkan bahawa isu perisytiharan statutori salah oleh setiausaha
B syarikat dicadangkan dan dihakimi oleh Mahkamah Rayuan dalam menolak rayuan perayu dan/atau oleh Mahkamah Persekutuan dalam menolak permohonan izin. Dengan itu, mahkamah tidak bersetuju dengan hakim yang bijaksana bahawa tindakan perayu ini adalah mengikut doktrin res judicata (lihat perenggan 38–39).

C (3) Meskipun begitu, mahkamah bersetuju dengan hakim yang bijaksana bahawa atas keterangan yang banyak, responden pertama hingga keempat telah membayar perayu berkaitan pembelian saham-saham dalam responden kelima. Hakim yang bijaksana mendapati bahawa
D terdapat perselisihan langsung dalam keterangan perayu dan responden pertama hingga keempat terhadap bayaran dan penerimaan RM80,000 bagi pembelian saham-saham tersebut. Yang Arif menerima keterangan responden pertama hingga keempat dan memberi alasan-alasannya untuk berbuat sedemikian. Mahkamah mendapati tiada asas untuk
E memutuskan sebaliknya dan untuk menyimpang daripada hakim yang bijaksana yang mempunyai kelebihan audio-visual dengan melihat dan mendengar saksi-saksi (lihat perenggan 41 & 46).

(4) Meskipun ketidakpatuhan dengan s 132D AS, hakim yang bijaksana mengisytiharkan pengeluaran saham-saham baru sebagai sah. Yang Arif
F berpandangan bahawa ia tidak perlu bagi pengeluaran saham-saham baru untuk diluluskan oleh mesyuarat agung kerana kesemua pemegang-pemegang saham juga adalah pengarah-pengarah; mereka semua hadir pada mesyuarat Lembaga pengarah pada 3 Mei 2005 dan tiada pemegang-pemegang saham terjejas dan diprejudis oleh
G penangguhan mesyuarat agung sebelumnya. Dalam mengisytiharkan yang pengeluaran saham-saham baru adalah sah, Yang Arif menjalankan kuasa yang sedia ada padanya di bawah s 355(2) AS. Mahkamah mendapati bahawa hakim yang bijaksana betul dalam penggunaannya terhadap s 355 AS. Hakim yang bijaksana telah mencapai kepada
H keputusannya dengan menilai, menimbang dan untuk alasan baik telah menerima keterangan responden pertama hingga keempat terhadap perayu. Tiada sebab untuk mahkamah campur tangan dapataan hakim yang bijaksana (lihat perenggan 48–50).]

I **Notes**

For cases on competency to maintain action, see 1(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3355–3360.

For cases on similar issues, see 2(5) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 8479–8483.

For cases on purchase of shares, see 3(1) *Mallal's Digest* (5th Ed, 2015) paras 1192–1194.

Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189, SC (refd)
Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd [2001] 4 MLJ 346, CA (refd)
China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal [1996] 2 MLJ 517, FC (refd)
Keet, In re [1905] 2 KB 666, CA (refd)
Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97, CA (refd)
Malpac Capital Sdn Bhd v Yong Toi Mee & Ors and another appeal [2017] 1 MLJ 262, CA (refd)
Sardar Mohd Roshan Khan (the sole owner trading under the name and style of Omar Khayam Enterprise) v Perwira Affin Bank Bhd (formerly known as Perwira Habib Bank Malaysia Bhd) and another appeal [2010] 4 MLJ 285, FC (folld)
Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor [2016] 3 MLJ 1, FC (refd)
Tong Lee Hwa & Anor v Lee Yoke San [1979] 1 MLJ 24, FC (refd)

Legislation referred to

Bankruptcy Act 1967 (now Insolvency Act 1967) s 38(1)
Companies Act 1965 ss 132D, 355, 355(2)
Companies Regulation 1966 Form 32A
Evidence Act 1950 s 44
Penal Code s 199
Rules of Court 2012 O 18 r 19(1)(b), (1)(c), (1)(d)

Appeal from: Civil Suit No 22–467 of 2009 (High Court, Pulau Pinang)

V Amareson (Amareson & Meera) for the appellant.
Adrian Silvarajoo (Ramli Yusuff & Co) for the respondents.

Tengku Maimun JCA (delivering judgment of the court):

INTRODUCTION

[1] There were two appeals before us. The first appeal P-02(IM)-209–01 of 2018 ('Appeal No IM 209') was filed by the appellant ('the plaintiff') against the order of the High Court in allowing the first respondent's ('the first defendant') application to strike out the plaintiff's claim under O 18 r 19(1)(b), (c) or (d) of the Rules of Court 2012 ('encl 134'). The second appeal P-02(W)-211–01 of 2018 ('Appeal No 211') was filed by the plaintiff against

A the dismissal of its claim after a full trial.

BACKGROUND FACTS

B **[2]** Briefly, on 15 July 2009, vide Civil Suit No 22–467 of 2009 filed at the High Court at Penang, the plaintiff sued the defendants, seeking, inter alia, for reliefs of declaration and injunction in relation to the transfer of shares in the fifth respondent ('the fifth defendant') to the first to fourth respondents ('the first to fourth defendants').

C **[3]** On 14 November 2014, a receiving and adjudication order was made against the plaintiff. On 20 January 2015, the plaintiff obtained sanction from the Director General of Insolvency ('DGI') to proceed with the civil suit.

D **[4]** On 13 March 2017, the first defendant filed encl 134. The application was premised on only one ground, namely that the plaintiff was not competent to maintain the action as he was adjudged a bankrupt.

E **[5]** On 26 September 2017, the receiving order and adjudication order against the plaintiff was annulled.

F **[6]** The learned judge dealt with encl 134 together with the trial, which commenced on 9 October 2017 and lasted for two days. Having heard the witnesses, on 28 December 2017, the learned judge dismissed the plaintiff's claim and allowed the first defendant's application in encl 134. Aggrieved, the plaintiff filed the two appeals.

G **[7]** At the outset we allowed Appeal No IM 209 as essentially we took the view that the learned judge was plainly wrong in allowing the first defendant's application to strike out the plaintiff's claim on the ground that the plaintiff was incompetent to maintain the civil suit. We opined that it did not stand to reason that the learned judge accepted that the plaintiff was not competent to maintain the action and therefore allowed the striking out, yet at the same time his Lordship proceeded to determine the plaintiff's claim on its merits.

H

I **[8]** In any event, s 38(1) of the Bankruptcy Act 1967 provides that where a bankrupt has not obtained his discharge, he shall be incompetent to maintain any action (other than an action for damages for an injury to his person) without the previous sanction of the DGI. In the instant case the DGI has in fact granted sanction to the plaintiff to proceed with the civil suit vide a letter dated 20 January 2015 which states, inter alia:

PERMOHONAN DI BAWAH SEKSYEN 38(1)(A) AKTA KEBANKRAPAN 1967

...

2. Dimaklumkan bahawa Ketua Pengarah Insolvensi telah meluluskan sanksi untuk tuan meneruskan tindakan di Mahkamah Tinggi Pulau Pinang bagi Guaman No 22-467-2009 dan melantik Tetuan Sitham & Associates untuk mewakili tuan dalam tindakan guaman tersebut.

[9] Further, by an order of the High Court dated 26 September 2017 which annulled the receiving and adjudication orders, the plaintiff was no longer a bankrupt. In *Sardar Mohd Roshan Khan (the sole owner trading under the name and style of Omar Khayam Enterprise) v Perwira Affin Bank Bhd (formerly known as Perwira Habib Bank Malaysia Bhd) and another appeal* [2010] 4 MLJ 285, the Federal Court followed *In re Keet* [1905] 2 KB 666, and held that once a bankruptcy is annulled, the annulment wipes out the bankruptcy altogether. The bankrupt is put in the same position as if there had been no adjudication.

[10] Applying the principle in *Sardar*, we found that the plaintiff was competent to maintain the civil suit. We therefore allowed the plaintiff's appeal against the striking out of the claim pursuant to encl 134. We set aside the order of the High Court and proceeded to hear the plaintiff's appeal against the dismissal of his claim.

THE PLAINTIFF'S CASE

[11] The plaintiff is a shareholder and director of the fifth defendant company. On or about 10 May 2004, the fifth defendant purchased properties known as Lots 35, 44, 45, 48 & 2816, Seksyen 1, Bandar Butterworth, Pulau Pinang for a purchase price of RM27,962,829.

[12] On 22 May 2004, the plaintiff appointed the first, second and the fourth defendants as directors of the fifth defendant. The third defendant was appointed director on 18 February 2005.

[13] Sometime around 18 February 2005, the first to the fourth defendants were invited by the plaintiff and another shareholder, Chen Mun Heng ('Chen') to be shareholders of the fifth defendant. The plaintiff agreed to sell 79,998 units of his shares whereas Chen agreed to sell two units. The value of each unit of share was RM1.

[14] The plaintiff contended that based on an oral agreement, he and Chen signed the transfer of shares form ('Form 32A') provided that the agreed consideration be paid by the first to the fourth defendants within a reasonable period of time.

A **[15]** The plaintiff further contended that the purchase price was not paid by the first to the fourth defendants but through their coercion, inducement and misrepresentation, the company secretary transferred and registered the shares in the first to the fourth defendants' names.

B **[16]** On 3 May 2005, the fifth defendant caused to be issued 2,946,283 new shares with the first defendant holding 1,473,143 shares and the second to the fourth defendants each holding 249,628 shares.

C **[17]** On 3 October 2005, the plaintiff filed an Originating Summons No 24–1537 of 2005 ('the OS') seeking for an order, inter alia, to cancel the share certificates of the fifth defendant that were issued by the company secretary to the first to fourth defendants.

D **[18]** In defending the OS, the first to the fourth defendants relied on a statutory declaration affirmed by the company secretary, Ong Ghin Leong ('Ong') dated 17 October 2005 where Ong stated that the plaintiff informed him that the purchase price of RM80,000 for the 80,000 shares had been fully settled by the first to the fourth defendants with the plaintiff and Chen. Ong
E further stated that the plaintiff had authorised him to transfer the shares and to release the share certificates to the first to fourth defendants.

[19] On 31 October 2005, Ong made a police report stating that the
F contents of his statutory declaration dated 17 October 2005 were incorrect. Ong made another police report on 31 October 2005 where he stated that the earlier report was made under threats and harassment of the plaintiff.

[20] The OS was heard by John Louis O'Hara J who dismissed it on
G 27 January 2006. Against the dismissal of the OS, the plaintiff filed an appeal to this court.

[21] On 3 July 2007, Ong made another police report stating that he was coerced by the first to the fourth defendants into making the statutory
H declaration dated 17 October 2005 and that the contents of his statutory declaration were false.

[22] On 29 May 2008, Ong was charged under s 199 of the Penal Code for giving false declaration dated 17 October 2005. Ong pleaded guilty and was
I sentenced to one day imprisonment and fine of RM4,000 by the Magistrates Court at Sungai Petani.

[23] On 14 January 2009, this court dismissed the plaintiff's appeal against the dismissal of the OS by the High Court. The plaintiff's application for leave to appeal to the Federal Court was also dismissed on 11 May 2009.

[24] Thereafter, the plaintiff filed the instant suit on the basis that the defendants had misled the High Court which resulted in the dismissal of the OS on 27 January 2006.

FINDINGS OF THE HIGH COURT

[25] The following were the issues for determination by the High Court:

(a) whether the instant suit is caught by res judicata and/or issue estoppel by reason that the disputes have or could have been determined in the OS and the subsequent appeals thereto;

(b) whether the first to the fourth defendants have paid the RM80,000 to the plaintiff for the purchase of the shares in the fifth defendant; and

(c) whether the issuance of the new 2,946,283 shares in the fifth defendant is valid.

[26] On the first issue, the learned judge noted the following facts:

(a) that Ong's statutory declaration dated 17 October 2005 formed part of John Louis O'Hara J's consideration and determination of the OS;

(b) that subsequent to the making of the aforesaid statutory declaration, Ong made several other statutory declarations, where he made changes to his statutory declaration;

(c) that by way of an application to adduce fresh evidence in the appeal against the dismissal of the OS, these statutory declarations and the guilty plea of Ong in the magistrates court were drawn to the attention of this court; and

(d) that this court nevertheless dismissed the plaintiff's appeal against the dismissal of the OS.

[27] Adverting to *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 and *Malpac Capital Sdn Bhd v Yong Toi Mee & Ors and another appeal* [2017] 1 MLJ 262, the learned judge held that the instant suit is an attempt by the plaintiff to re-litigate the disputes between the parties in the OS, and that based either on the doctrine of res judicata or issue estoppel or both, the plaintiff is prevented from re-litigating the disputes.

[28] His Lordship also considered the plaintiff's argument that he had the right to initiate this suit as an impeachment action on the earlier OS judgment.

Citing *Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 MLJ 1, the learned judge held that the plaintiff cannot avail himself of the doctrine of impeachment of action by way of fresh action as this is an instance of intrinsic fraud and not extrinsic fraud.

[29] However, for completeness, the learned judge proceeded to consider the other issues.

[30] On whether the first to the fourth defendants have paid RM80,000 to the plaintiff, the learned judge found that there was an obvious conflict of evidence between the testimony of the plaintiff and Ong on the one side and that of the first to the fourth defendants on the other side. His Lordship found Ong to be an unreliable witness and hence concluded that it would be unsafe for him to act on Ong's testimony. The learned judge preferred the evidence of the first to the fourth defendants that they have already paid to the plaintiff (for him and Chen) RM80,000 in cash on or sometime shortly after 18 February 2005.

[31] On the third issue, the learned judge held that notwithstanding that a general meeting was not convened to obtain the approval of the existing shareholders prior to the board of directors approval for the issuance of the new shares in the fifth defendant on 3 May 2005, no injustice had been occasioned as all the existing shareholders are also directors and they were all present at that meeting. In exercise of the powers under s 355(2) of the Companies Act 1965 ('the CA 1965'), His Lordship declared that the issuance of the new shares in the fifth defendant company is valid.

THE APPEAL

[32] For brevity, we do not propose to set out the submissions of the respective parties, except to state that the plaintiff submitted that the learned judge erred in concluding that the doctrine of res judicata is applicable to the instant suit. In support of his submission, learned counsel relied on the cases of *Seruan Gemilang* and *Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd* [2001] 4 MLJ 346.

[33] It was further submitted for the plaintiff that the learned judge erred on the second issue as there was no evidence of payment by the first to the fourth defendants of the RM80,000 and that the issuance of the 2 million over new shares contravened s 132D of the CA 1965.

OUR DECISION

[34] The principles of res judicata and/or issue estoppel as set out in *Asia Kawal Teliti* is reproduced below:

> What is res judicata? It simply means a matter adjudged, and its significance lies in its effect of creating an estoppel per rem judicatum. When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the res judicata, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth: *res judicata pro veritate accipitur*. The public policy of the law is that, it is in the public interest that there should be finality in litigation — *interest rei publicae ut sit finis litium* ...

[35] Thus, for the doctrine of res judicata to apply, the matter or point in issue must be adjudicated between the parties. In other words, there must be a decision or judgment on the issue. In *Tong Lee Hwa & Anor v Lee Yoke San* [1979] 1 MLJ 24, Chang Min Tat FJ said:

> At the hearing of the appeal, it was put to counsel for the appellants that to constitute a res judicata, the earlier judgment must, in terms of the Privy Council decision in *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] AC 993; [1964] MLJ 49, 'necessarily and with precision' determine the point in issue, and he was asked to indicate to the court how the earlier judgment did necessarily and with precision determine the liability of the appellants to pay the respondent for work done for them at their request. He did not do so. We do not, with respect, see how he could succeed.

[36] In the OS, the statutory declaration affirmed by Ong formed the basis of the decision of the High Court in dismissing the plaintiff's claim. This can be seen from the following extract of the judgment of John Louis O'Hara J (ROA Vol 2B: pp 562–563):

> Saya melihat dakwaan Pemohon ini sama sekali tidak berasas. Keterangan menunjukkan bahawa pada 18.2.2005 Responden Pertama hingga Responden Keempat membeli 49,990, 10,000, 10,000 dan 10,000 saham masing-masing Syarikat tersebut. Responden Pertama hingga Responden Keempat telah menjelaskan secara tunai kepada Pemohon sebagai balasan. Pemohon dan Chen Mun Heng telah menandatangani Borang 32A dan mengarahkan setiausaha Syarikat tersebut, Ong Ghin Leong untuk memindahmilik saham Syarikat tersebut kepada Responden Pertama hingga Responden Keempat. Pemohon telah menandatangani sijil saham baru yang dikeluarkan selepas pindahmilik. Surat akaun (sic) setiausaha Syarikat tersebut mengesahkan:
>
> (a) kesemua Borang Pindahmilik 32A ditandatangani oleh semua pihak di hadapan setiausaha Syarikat dan disaksikan oleh setiausaha Syarikat;

(b) Pemohon mengesahkan dam memberitahu setiausaha Syarikat bahawa kesemua balasan dalam Borang Pindahmilik telahpun dijelaskan dengan sepenuhnya oleh Responden-Responden;

(c) Pemohon mengarahkan setiausaha Syarikat membuat pindahmilik saham menurut Borang Pindahmilik;

(d) Pemohon yang menandatangani sijil saham dam memberikuasa kepada setiausaha Syarikat untuk melepaskan sijil saham asal tersebut.

[37] We were mindful of the fact that the decision of John Louis O'Hara J in dismissing the OS was affirmed by this court and that the plaintiff's application for leave to appeal was refused by the Federal Court.

[38] The instant suit was filed to impeach the decision in the OS on the basis that the company secretary had committed perjury in the making of the statutory declaration relied upon by John Louis O'Hara J. While we agreed with the learned judge that the instant case involved intrinsic fraud and therefore the plaintiff could not avail himself of s 44 of the Evidence Act 1950 (see *Seruan Gemilang*), we nevertheless found nothing in the record of appeal to show that the issue of false statutory declaration by the company secretary was canvassed and adjudicated by this court in dismissing the plaintiff's appeal and/or by the Federal Court in dismissing the leave application.

[39] As a matter of fact, the plaintiff's application to adduce fresh evidence in respect of the statutory declaration and the charge for perjury against Ong was dismissed by this court which means that this issue was not canvassed and decided in the appeal. The statutory declaration and the guilty plea of Ong were merely drawn to the attention of this court. As such, with respect, we disagreed with the learned judge that the plaintiff's instant suit is caught by the doctrine of res judicata.

[40] Be that as it may, we were not persuaded that the learned judge erred on the other two issues. It is trite that an appellate court will not intervene unless it was shown that the trial court was plainly wrong in arriving at its decision or that there had been no or insufficient judicial appreciation of the evidence (see *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97; *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517).

[41] The learned judge found that there was a direct clash in the testimony of the plaintiff and the first to the fourth defendants over the payment and receipt of the RM80,000 for the purchase of the shares in the fifth defendant company. His Lordship accepted the evidence of the latter and he gave his reasons for doing so.

[42] Ong testified for the plaintiff and in respect of his evidence, the learned judge stated:

> 42. ... I find him to be a perfidious and shifty witness from this demeanour and answers in response to questioning of counsel. This is corroborated by the chronicles of his contemporaneous conduct in 2005–2007 in changing statutory declarations whenever confronted by the parties. I also find his justifications and excuses for his action feeble if not incredulous. In *Tan Ban Ulu & Anor v Ong Ghin Leong* [2017] MLJU 244, Collin Lawrence Sequerah J shared the same sentiments and found him as follows:
>
> > [75] Given the numerous contradictions in the statements made by the defendant as outlined above, the defendant's actions clearly amounted to a blatant disregard as to whether his statements were true or false. He could not possibly have entertained the belief that what he said in all the statements he made were true. His actions displayed a reckless abandon for the sanctity of the truth ...
> >
> > ...
> >
> > [92] From the overall conduct of the defendant as alluded to above, it is evident that the plea by the defendant that he was subject to duress and coercion in making these statements in his (SD's), police reports and affidavits cannot hold true. The defendant was a company secretary and an educated man. He came across as no 'country bumpkin' who would meekly succumb to whatever pressures placed upon him by others. There was therefore nothing that operated to negative malice on the part of the defendant.

[43] In so far as the evidence of the first to the fourth defendants on the payment and receipt of RM80,000 is concerned, His Lordship said:

> 44. ... I prefer the evidence of the latter from their demenour and candour generally especially that of the fourth defendant who is the nephew of the plaintiff. I quote the relevant portion of his testimony below under cross-examination:
>
> > Counsel: Mr Khaw, I am putting it to you that you together with the three other Defendants had forced the company secretary to release the new share certificates for the allotment of the new shares and to register the transfer of the 80,000 shares into your respective names despite you all not having paid for the 80,000 shares and for the new shares?
> >
> > Witness: Disagree. Can I explain?
> >
> > Judge: Alright, yes. Since Mr Khaw is English speaking, so easier to understand. Yes?
> >
> > ...
> >
> > Witness: I don't agree My Lord because during the time Khaw Tiew Chai was the person who run the company. All the people as My Lord can see like myself I got my own work. Law Ah Lean I think he got other business. So Khaw Tiew Chai was the person who run and operate the company. And he was the person who liaised with the company secretary. So we know nothing, we pay all we have to

> pay and share cert all been issued accordingly and then after that some discrepancy going on regarding the CBT, all these kind of nothing, may be I put it aside and since that day Khaw Tiew Chai suddenly start the summons against us and say we never pay the 80,000. So we are not the professional like Ong Ghin Leong who prepare all the company cert all these kind of things, we don't know head or tails ok. You guys prepare all these kind of things and suddenly you guys come and tell me that it's not there.

[44] The learned judge also found that the plaintiff is an astute businessman and that he would not have signed Form 32A and the new share certificates dated 18 February 2005 if the payment for the shares had not already been received by him. Even if he had only pre-signed the forms and the new share certificates and given them to Ong to be held in escrow pending payment, His Lordship found that the plaintiff must also have instructed Ong to effect the transfer and release of the new share certificates to the first to the fourth defendants. Otherwise Ong would not have released the new share certificates to them. The learned judge further found that Ong had acted voluntarily because his complaints of threats and harassment by the first to the fourth defendants only took place in July 2005 as stated by him in his police report dated 3 July 2007.

[45] His Lordship also considered the evidence that parties met on 3 May 2005 and jointly approved the board of directors' resolution to increase the share capital in the fifth defendant to 2,946,283 shares. The learned judge found that by then, the first to the fourth defendants had paid the RM80,000 to the plaintiff and Chen; if not, this board of directors' resolution would not have been approved and that it otherwise affronts common sense. His Lordship further considered the fact that there was no contemporaneous note of protest at the material time by the plaintiff pertaining to the alleged non-payment of his 79,998 shares from the documentary evidence adduced. The learned judge also found that the plaintiff did not in his oral evidence, allude to any protest or qualification that he made on that day in relation to the same.

[46] We found no basis to rule otherwise and to depart from the learned judge who had the audio visual advantage of seeing and hearing the witnesses. We agreed with the learned judge that on the preponderance of the evidence, the first to the fourth defendants had paid the plaintiff in respect of the purchase of the shares in the fifth defendant.

[47] As regards the validity of the issuance of the new shares, it was the plaintiff's primary contention that the issuance was invalid because it was only approved by the board of directors but not at the general meeting. This was in contravention of s 132D of the CA 1965, which provides that the directors shall not without the prior approval of the company in general meeting,

exercise any power of the company to issue shares. A

[48] Notwithstanding the non-compliance with s 132D of the CA 1965, the learned judge declared the issuance of the new shares as valid. His Lordship opined that it was unnecessary for the issuance of the new shares to be approved by the general meeting because all the existing shareholders are also directors; they were all present at the board of directors' meeting on 3 May 2005 and that no existing shareholders were affected and prejudiced by the non-holding of the prior general meeting. In declaring that the issuance of the new shares is valid, His Lordship exercised the power available to him under s 355(2) of the CA 1965. B C

[49] In our judgment, the learned judge was correct in his application of s 355 of the CA 1965 which provides:

D

355 Irregularities in proceedings

(1) No proceeding under this Act shall be invalidated by any defect, irregularity or deficiency of notice or time unless the Court is of the opinion that substantial injustice has been or may be caused thereby which cannot be remedied by any order of the Court.

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(2) The Court may if it thinks fit make an order declaring that the proceeding is valid notwithstanding any such defect, irregularity or deficiency.

(3) Without affecting the generality of subsections (1) and (2) or of any other provisions of this Act, where any omission, defect, error or irregularity (including the absence of a quorum at any meeting of the company or of the directors) has occurred in the management or administration of a company whereby any breach of this Act has occurred, or whereby there has been default in the observance of the memorandum or articles of the company or whereby any proceedings at or in connection with any meeting of the company or of the directors thereof or any assemblage purporting to be such a meeting have been rendered ineffective including the failure to make or lodge any declaration of solvency pursuant to section 257, the Court — F G

(a) may, either of its own motion or on the application of any interested person, make such order as it thinks fit to rectify or cause to be rectified or to negative or modify or cause to be modified the consequences in law of any such omission, defect, error or irregularity, or to validate any act, matter or thing rendered or alleged to have been rendered invalid by or as a result of any such omission, defect, error or irregularity; H

(b) shall, before making any such order, satisfy itself that such an order would not do injustice to the company or to any member or creditor thereof; I

(c) where any such order is made, may give such ancillary or consequential directions as it thinks fit; and

(d) may determine what notice or summons is to be given to other persons of the intention to make any such application or of the intention to make

such an order, and whether and how it should be given or served and whether it should be advertised in any newspaper.

(4) The Court (whether the company is in process of being wound up or not) may enlarge or abridge any time for doing any act or taking any proceeding allowed or limited by this Act upon such terms, if any, as the justice of the case may require and any such enlargement may be ordered although the application for the same is not made until after the time originally allowed or limited.

CONCLUSION

[50] The learned judge had arrived at his decision by assessing, weighing and for good reasons had accepted the evidence of the first to the fourth defendants over the plaintiff. There was no reason for us to disturb the findings of the learned judge. We therefore unanimously dismissed the plaintiff's Appeal No 211 with no order as to costs.

Appeal No IM 209 allowed; Appeal No 211 dismissed with no order as to costs.

Reported by Dzulqarnain Ab Fatar